Once More into the (Alleged...) Breach

Once more unto the (alleged…) breach: the EU Commission reopens the Google file…

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In many ways, it could have been predicted–when last February Commissioner Almunia announced that a settlement had been reached as regards the allegations of abuse of a dominant position made against Google criticism was almost inevitable (see: http://www.clie.law.ed.ac.uk/2014/02/28/when-is-an-anti-competitive-practice-truly-of-serious-concern-the-google-commitments-decision-leaves-this-and-other-questions-open/ for what had been said on this blog). The perceived lack of "proper and exhaustive" market testing for the commitments agreed by Google, the reliance on Article 9 as a way of addressing the consequences of what was clearly a serious prima facie infringement and, more generally, the absence of a "proper finding" as to whether these allegations had been well-founded were all raised as areas of grave concern as to the response to the Commission's decision.

Against this background, one could legitimately wonder whether the recent decision to reopen the Google file (see e.g. http://www.theguardian.com/technology/2014/sep/08/european-commission-reopens-google-antitrust-investigation-after-political-storm-over-proposed-settlement for an agile summary of the decision and surrounding events) may be the result of deeper reflection and analysis of the evidence that was available at the time of the commitments decision and also of the outcome of more recent market testing. In his speech at the Conference on International Antitrust law and policy (see: http://europa.eu/rapid/press-release_SPEECH-14-592_en.htm) Mr Almunia openly acknowledged that "new arguments and elements" had been provided by interested parties in the course of more exhaustive market testing of the remedies package being devised for Google; as a result, in his view the Commission was fully justified in re-opening the investigation on the strength of the new evidence: in the Commissioner's words, "every time I have talked about Google's proposals as a basis for an Article 9 decision, I've always made clear that it was without prejudice of the complainant's arguments". Seen in this light, it could be argued that the scope of Article 9 and the substance of the decisions adopted on the basis of this provision acted as something akin to a safety valve, since they provided the Commission with the framework within which to re-assess, against the background of fresh evidence, whether the initial commitments' package was an appropriate response to the competition concerns arising from Google's conduct as regards the integration of its own sale services within its search engine facility. In this context the flexibility offered by Article 9 has permitted fresh investigations as to the existence or otherwise of an abuse of a dominant position, something which a more formal outcome would not have allowed.

It is however still unclear whether this can be regarded as an advantage stemming from the adoption of a less formal commitments decision or as a symptom of the fact that its flexibility comes at the cost of a less exacting and in-depth assessment of the evidence which(often in hindsight and at a later stage) may (and as in this case often does) point to the existence of a prima facie more serious infringement of the competition rules. More generally, it is at least questionable whether the limitations stemming from Article 9 as regards legal certainty and finality in individual cases can be justified by the concern for providing fast-moving and often complex markets with "quick fixes" whose effectiveness may be limited in time, due to the very nature of the industries concerned. When Council Regulation No 1/2003 was enacted Article 9 decisions were regarded as a way of tackling the anti-competitive impact of practices that were perceived as being "less serious". In these circumstances, it could have been thought that leaving it to the goodwill of a dominant company to modify its commercial practices and thereby to neutralise any restrictive effects on rivalry would have represented an "acceptable compromise" between concerns for maintaining the integrity of competition on a given market and demands of expeditiousness in the design and imposition of commitments. However, what emerges starkly from the Google story so far is

that, once Article 9 decisions are relied upon outside the remit for which they were originally thought, the consequences cannot be fully predicted: it is in many ways to the credit of the outgoing Competition Commissioner that the EU competition officers have been willing to reopen such a controversial case after taking on board the outcome of the market testing phase of the projected commitments. Nonetheless, it cannot be doubted that in a fast-moving industry like the one for the provision of search engine and internet sales services the lapse of time between a "provisional solution", such as that envisaged in February 2014 and a future, more "final" decision, which is not likely to see the light before early next year, may increase the risk that any remaining rivalry be irremediably compromised.

It is acknowledged that, as the General Court admitted in the Microsoft/Skype appeal judgment (Case T-79/12, judgment of 11 December 2013), any position of market power held on fast-changing industries, such as those for the provision of internet services (in that case, of Voice-Over-Internet communications) are less likely to endure than in more traditional markets; thus, it could be suggested that any anti-competitive effect stemming from the conduct of companies enjoying such positions may also be of limited duration. However, in consideration of the network effects characterising these industries and of the potentially irreversible impact of this "feedback loop" it is argued that there is an inevitable risk of compromising any residual competition, if no decisive intervention is resorted to within the short to medium term.

In February it had been suggested on this blog that "(…) the Commission may have chosen to adopt an approach to these issues that is more "responsive" to the nature of the market and to the demands of consumer welfare in a case which could have warranted a less "expensive" (especially in monitoring terms) and perhaps more forceful solution (…)". Maybe, it is this more "forceful" response to the concerns arising from Google's conduct that the Commission will seek to identify now that it goes about engaging with the outcome of the market testing initiated at the beginning of 2014.